

# CHAPTER 10

## STANDARDS OF CONDUCT



"All I did was give a friend of mine some information on a competitor's proposal."

### **Learning Objectives**

- 10-1 Identify standards of conduct that apply to the procurement process.
- 10-2 Provide examples of activities that are prohibited under each standard.

*Exhibit 10-1. Learning Objectives.*

## **CHAPTER INTRODUCTION**

The public expects Government operations of all kinds to be open, honest, and fair-dealing. This is especially true relative to procurement. There are two principal reasons for this public concern:

- Public interest in how their money is spent — around \$200 billion per year on Government contracts.
- Concern among those competing for Government contracts about the integrity of the process.

You will probably see much material and hear many briefings or presentations pertaining to the broad area of ethics in Government contracting. Some of the material is redundant and may be addressed under titles such as:

- Standards of Conduct.
- Ethics.
- Conflicts of Interest.
- Improper Business Practices.

This chapter summarizes the FAR coverage of the subject, especially as contained in Part 3. Be sure that you consult regulations within your agency for more specific guidance.

## 10.1 STANDARDS OF CONDUCT (GENERAL)

Government officials involved in the expenditure of public funds have positions of trust and grave responsibility that require the observance of the highest ethical standards. Such officials must:

- Earn the highest degree of public trust.
- Display impeccable standards of conduct.

The resulting standards state that Government business shall be conducted in a manner beyond reproach. Except as authorized by the statute or regulations; they shall be conducted with:

- Complete impartiality.
- Preferential treatment to none.

The caveat “except as authorized by statute or regulation” refers to such preferential programs as small and small/disadvantaged business set asides.

To achieve those standards, the regulation requires that you, in your Government-contractor relationships:

- Avoid any conflict of interest.
- Avoid the appearance of any conflict of interest.
- Conduct yourself so that you would have no reluctance to make a full public disclosure of your actions.

The violation of the standards of conduct may result in fines, imprisonment, dismissal, debarment, or other penalties.

### **EXECUTIVE ORDER 11222**

“STANDARD OF ETHICAL CONDUCT FOR GOVERNMENT OFFICERS AND EMPLOYEES”

POLICY

“Where Government is based on consent of the governed, every citizen is entitled to have complete confidence in the integrity of his Government. Each individual officer, employee or advisor of Government must help to earn and must honor that trust by his own integrity and conduct in all official actions.”

## 10.2 STANDARDS OF CONDUCT (GOVERNMENT PERSONNEL)

Generally, a Government official or employee must avoid any action which might result in, or create the appearance of:

- Using public office for private gain.
- Giving preferential treatment to any person.
- Impeding Government efficiency or economy.
- Losing complete independence or impartiality.
- Making a Government decision outside official channels.
- Affecting adversely the confidence of the public in the integrity of the Government.
- Disclosing proprietary or source selection information to unauthorized sources.

These standards apply to all Government personnel, with special emphasis on those persons involved in the acquisition process, including:

- Contracting personnel.
- Technical and engineering personnel
- Financial personnel
- Clerical, support and administrative personnel
- Program/project managers and agency management
- Contract support personnel
- Anyone else who: (1) determines requirements, (2) evaluates technical proposals, or (3) prepares specifications

The Federal Acquisition Regulation and Title 18 of the United States Code specifically prohibit certain types of conduct by Federal employees. Exhibit 10-3 lists some of those prohibitions.

### **PROHIBITED CONDUCT**

- Bribes
- Representing contractors
- Making or recommending official decisions in which you have a financial interest
- Conspiring to defraud the Government
- False statements and cover-ups
- Disclosing source selection or proprietary information
- Contracting with Government employees
- Contracting with Members of Congress

*Exhibit 10-3. Prohibited Conduct.*

**10.2.1 Bribes**

FAR 3.101

Do not solicit or accept any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who:

- Has or is seeking Government business with your agency.
- Conducts activities that are regulated by your agency (e.g., FCC, FAA, EPA).
- Has interests that may be substantially affected by your performance or nonperformance of your official duties.

Policies vary from one agency to another on whether you may accept items of "nominal" value. Prior to accepting any such item, check your agency's individual regulations on standards of conduct. Even where your agency's regulations might be construed to permit receipt of the item, you still would be best advised to refrain from accepting the item.

Also note that, under 18 USC § 201, it is a criminal offense for a public official to directly or indirectly corruptly seek, receive, or agree to accept, anything of value personally in return for:

- Being influenced in an official act.
- Committing or allowing fraud.
- Violating his/her lawful duty.

**Penalty:** Fine of not more than 3 times the value of the bribe, or imprisonment of not more than 5 years, or both; may also be disqualified from holding office or position of trust or profit with the United States.

That same statute also makes it a criminal offense for such a public official to directly or indirectly seek, receive, or agree to accept anything of value personally for, or because of, any official act performed or to be performed. The only exception are payments authorized by law, such as application or filing fees.

**Penalty:** Fine of not more than 3 times the value of the illegal gratuity, or imprisonment of not more than 2 years, or both.

**10.2.2 Representing Contractors**

Per 18 USC § 205, do not act on behalf of a party in any matter, including a claim or contract, in which the United States has an interest. This prohibition extends to matters before any agency or tribunal.

**Penalty:** Fine of not more than \$10,000, imprisonment of not more than 2 years or both.

Also, per 18 USC § 207, do not take a position with a contractor and then represent that contractor:

- On any matter in which you had personally and substantially participated as a Government official
- On matters that were under your official responsibility during your last year of Federal service (within two years after leaving the Government)

### 10.2.3 Official Decisions In Which You Have A Financial Interest

Per 18 USC § 208, do not participate personally and substantially in a particular matter in which any of the following have a financial interest:

- You.
- Your spouse.
- Your minor child.
- Your partner.
- An organization in which you are serving as officer, director, trustee, partner, or employee.
- A person or organization with whom you are negotiating for prospective employment.

This restriction may be waived by the appointing official if the financial interest is found to have no affect on the integrity of your services.

**Penalty:** A fine of not more that \$10,000 or imprisonment of not more than 2 years, or both.

### 10.2.4 Conspiring to Defraud the Government

Per 18 USC § 286, do not enter into any agreement or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim.

**Penalty:** Fine of not more than \$10,000 or imprisonment of not more than 10 years or both.

In addition, 18 USC § 371 more generally prohibits any conspiracy by two or more persons to commit any offense against the United States, or to defraud the United States or any agency thereof.

**Penalty:** Each person who acts to effect the conspiracy will be fined not more than \$10,000 or imprisoned not more than 5 years or both; unless the offense which is the object of the conspiracy is a misdemeanor, then the punishment shall not exceed the maximum punishment provided for such misdemeanor.

### 10.2.5 False Statements and Cover-Ups

Per 18 USC § 1001, do not falsify, conceal or cover-up by any trick, scheme, or device material fact, statements or representations or make or use any false writing or document knowing it to contain any false, fictitious or fraudulent statement or entry.

**Penalty:** Fine of not more than \$10,000 or imprisonment of not more than 5 years or both.

### 10.2.6 Disclosing Source Selection or Proprietary Information

Make no unauthorized disclosures of:

- A contractor's proprietary information.
- Government source selection information.

An overriding general rule is that a Government employee shall not release information to any one source that would give that source an unfair competitive advantage over another source. What may be disclosed varies from phase to phase of the acquisition process.

The following is a summary of what may be disclosed during each phase.

#### Presolicitation Phase

FAR 14.211 and 15.402(b)
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Do not disclose any information on a proposed procurement or future solicitation to any prospective contractor or to any other unauthorized party, except through:

- Release of long-range acquisition estimates (FAR 5.404).
- CBD synopses (FAR 5.201).
- Presolicitation notices prepared by the CO and synopsisized (FAR 14.205-4(c) and 15.404) .
- Presolicitation conferences conducted by the CO (FAR 15.404).
- Solicitations for information or planning purposes issued by the CO (FAR 15.405).

CHAPTER 10

Solicitation Phase  
(Prior to Evaluating  
Offers)

FAR 14.211, 15.411,  
15.413, 52.214-6, &  
52.215-14

- Only the CO, the CO's superiors, or others specifically authorized may discuss the solicitation with competing contractors.
- Only the CO, CO's superiors, or others specifically authorized may transmit technical or other information on the solicitation to competing contractors.
- Instruct offerors to put their questions in writing and do it early, as provided in 52.214-6 and 52.215-14.
- Do not disclose information that would afford one competing contractor an advantage over others. Among other things:
  - Before bid opening, do not disclose the number or identity of bids received.
  - In negotiated procurements, do not disclose the identity of any offeror or the number of offers received.
- Furnish only general information upon request that would not be prejudicial to other competing contractors. Otherwise, amend the solicitation.

Evaluation/Award  
Phase

FAR 14.402,  
14.404-4, 15.413,  
& 15.610(c)

In sealed bidding:

- Bids may be examined by the public (after bid opening).
- Bidders may restrict public disclosure of descriptive literature.

However, a restriction may render a bid nonresponsive under the conditions prescribed in FAR 14.404-4.

In negotiated procurements:

- Offerors may restrict disclosure or use of data in proposals.
- Do not disclose the contents of any offer to the public or other offerors.
- Only the CO, CO's superiors, or others specifically authorized may exchange data with offerors and talk to contractors.

Post-Award Phase

FAR 15.1004

When debriefing unsuccessful offerors, do not disclose the information not releasable under Freedom of Information Act (FOIA). Also, do NOT provide point-by-point comparisons of the debriefed offeror's proposal with those of other offerors. See section 7.4.2.2 for more details on debriefings.

All Phases

FAR 9.105-3

Do not disclose information on an offeror's responsibility, except as provided in the FOIA.

In addition to these FAR provisions on disclosure, 18 USC § 1905 forbids publishing, disclosing, allowing to be seen or examined, or the making known in any manner or to any extent not authorized by law any information obtained in the course of employment or official duties by reason of examination, investigation, report, or record filed with the officer or employee's agency that concerns or relates to trade secrets, operations, data, sources of income, profits, losses or expenditures, including books and abstracts of such data of any person, firm, partnership, association or corporation.

**Penalty:** A fine of not more than \$1,000, imprisonment of not more than 1 year, or both, and removal from office or employment.

### 10.2.7 Contracting With Government Employees

Do not knowingly award a contract to a:

FAR 3.6

- Government employee
- Business concern or other organization owned or substantially owned or controlled by one or more Government employees

The head of an agency or HCA may authorize an exception only if there is a compelling reason to do so.

### 10.2.8 Contracting with Members of Congress

Do not award a contract when any member of Congress (or any delegate to Congress or resident commissioner) would have any share or part of the contract or any benefit arising from it (18 USC §431 & 432).

**EXCERPTS FROM A TYPICAL AGENCY PENALTY GUIDE**

<u>Type of Misconduct</u>	<u>1st Offense</u>	<u>2nd Offense</u>	<u>3rd Offense</u>
Engaging in outside employment without prior written approval:			
a. no conflict present	Warning	Reprimand	Suspended/ Removal
b. conflict present	Reprimand/	Removal	_____
Knowing and willful misstatement or omission of material facts from official documents, contract files, or records.	Reprimand/	Removal	_____
Knowing and willful use of public office for private gain.	Removal	_____	_____
Misconduct whether or not in violation of criminal statute which impairs performance or trustworthiness.	Reprimand/ Removal	Suspension/ Removal	_____
Negligent or willful contract mismanagement.	Reprimand/ Removal	Suspension/ Removal	Removal
Negligent or willful failure to maintain contract files.	Reprimand/ Removal	Suspension/ Removal	Suspension/ Removal
Knowing and willful failure to secure competition when required.	Suspension/ Removal	Suspension/ Removal	Removal
Awarding more than one contract to avoid authority limits or requirements.	Suspension/ Removal	Suspension/ Removal	Removal
Negligent or willful award of contracts in excess of authority.	Reprimand/ Removal	Suspension/ Removal	Removal
Negligent or willful preparation or issuance of contract for unreasonable quantities.	Reprimand/ Removal	Suspension/ Removal	Removal
Knowingly preparing inaccurate estimates in proposal/bid process with resultant losses to Government.	Reprimand/ Suspension	Suspension/ Removal	Removal

*Exhibit 10-4. Excerpts From a Typical Agency Penalty Guide.*

### 10.3 STANDARDS OF CONDUCT (CONTRACTORS)

Contractors and prospective contractors may not engage in improper business practices that would bring about the situations noted in Section 10.2. Based on a finding that a firm has violated laws or standards of conduct, a CO may:

- Determine that the firm is nonresponsible for the instant procurement under the General Standards on integrity or eligibility.
- Recommend the firm for debarment or suspension to the debarment official.
- Void or rescind contracts in relation to which there has been:
  - A final conviction of bribery.
  - A conflict of interest.
  - Misconduct.

In addition, a number of these standards carry additional statutory penalties. Examples of specific standards that apply to contractors are described in the following sections.

#### 10.3.1 Offers of Employment

As a general rule, it is unethical to offer employment to a Government employee if the purpose of such an offer is to gain an unfair advantage or otherwise improperly benefit from the offer.

#### 10.3.2 Collusive Pricing

Offerors must submit prices that are arrived at independently:

- Without (for the purpose of restricting competition):
  - Consultation.
  - Communication.
  - Agreement.
- With any other offeror or competitor relating to:
  - Prices.
  - Intention to submit an offer.
  - Methods or factors used to calculate the prices offered.

### **10.3.3 Contractor Gratuities to Government Personnel**

A contractor's right to receive a contract or to keep a contract may be denied if the agency head determines that the contractor, its agent, or representative offered or gave a gratuity to an officer, official, or employee of the Government for the purpose of obtaining:

- A contract.
- Favorable treatment under an existing contract.

### **10.3.4 Anti-Trust Violations**

Violations that eliminate competition or restrain trade include:

- Collusive bidding.
- Rotated low bids.
- Collusive price estimating systems.
- Follow-the-leader pricing.
- Sharing of the business.

### **10.3.5 Contingent Fees**

A contingent fee is a fee that depends upon the success that a person or concern has in securing a Government contract; such as a:

- Commission.
- Brokerage.
- Percentage.

The payment of contingent fee is considered contrary to public policy because it may lead to "attempted or actual exercise of improper influence." The prohibition against the payment of a contingent fee does not apply to fees paid to a bonafide employee or agency.

This policy is implemented by including the clause "Covenant Against Contingent Fees" in (most) contracts. In the clause, the contractor warrants that "no person or agency has been employed or retained to solicit or obtain this contract upon an agreement or understanding for a contingent fee, except a bonafide employee or agency."

### 10.3.6 Subcontractor Kickbacks

The standard comes from the "Anti-Kickback Act of 1986." Its purpose is to discourage:

- subcontractors from making payments, and
- contractors from accepting payments,

for the purpose of obtaining or rewarding favorable treatment in connections with a prime contract or a subcontract relating to a prime contract. Exhibit 10-5 shows examples of kickbacks.

<b>EXAMPLE OF KICKBACKS</b>	
• Money	• Gratuity
• Fee	• Thing of value
• Commission	• Other compensation
• Gift	

*Exhibit 10-5. Example of Kickbacks.*

### 10.3.7 Unreasonable Restrictions on Subcontractor Sales

Prime contractors should not unreasonably preclude subcontractors from making direct sales to the Government of the kinds of supplies or services furnished to the prime contractor for use under its contracts with the Government.

## 10.4 PROCUREMENT INTEGRITY

In 41 U.S.C. 423, the Congress established additional prohibitions—and additional administrative, contractual, civil, and criminal penalties—with respect to:

- Discussions of future employment or business opportunities between Federal procurement officials and competing contractors.
- Bribes and gratuities.
- The unauthorized disclosure of source selection and proprietary information.

Furthermore, this section of law establishes additional postemployment restrictions on Government officers and employees who served as procurement officials prior to separation from the Government.

See section 3.104 of the FAR for the effective dates and implementation of statutory requirements for procurement integrity.